FEDERALLY SPEAKING

by Barry J. Lipson

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Welcome to **Federally Speaking,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 28th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm.

LIBERTY'S CORNER

KAUPP: EXPLOITATION OF ILLEGAL ARREST. While sometimes it may seem like the barbarians are at the gates of our **Constitutional Democracy** trying to tear away at our hard won **liberties**, and fear of them may seem to cause us to do so for them, it is reassuring to see the **U.S. Supreme Court** doing its job of protecting us from ourselves and preserving these **liberties**. The Sheriff's Office of Harris County, Texas had a missing 14-year old girl on their hands, evidence of incest with her 19-year old half brother, and evidence that 17-year old Robert Kaupp was with her half brother on the day that "he confessed that he had fatally stabbed his half sister and placed her body in a drainage ditch" and "implicated Kaupp in the crime." To "confront" Kaupp with the crime, a detective with two officers "went to Kaupp's bedroom, awakened him with a flashlight, identified himself, and said, 'we need to go and talk.'… Kaupp said 'Okay.'…The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. … They stopped for 5 or 10 minutes where the victim's body had just been found, … and then went on to the sheriff's headquarters. There, they took Kaupp to an interview room, removed his handcuffs, and advised him of his rights under ***Miranda v. Arizona***, 384 U. S. 436 (1966). … 10 or 15 minutes into the interrogation, told of the brother's confession, he admitted having some part in the crime." Kaupp was indicted for murder. Good Texas police work? The **U.S. Supreme Court** in a long ***Per Curiam*** opinion said no. ***Robert Kaupp V. Texas,*** No. 02–5636. May 5, 2003 (538 U. S. __ (2003)). You see the State of Texas did not have **probable cause** for an arrest and the **U.S. Supreme Court** found that what was described above was, indeed, an arrest. No **probable cause** you say, you better tell the rest of the story. Ok, there was "no evidence or motive to corroborate the brother's allegations of Kaupp's involvement," and "the brother had previously failed three polygraph examinations, while, only two days earlier, Kaupp had voluntarily taken and passed one, in which he denied his involvement." Even the Sheriff's Office testified they "did not believe they had probable cause for Kaupp's arrest" and, thus, sought no arrest warrant. Therefore, under "the **Fourth Amendment** rule that a confession 'obtained by **exploitation of an illegal arrest'** may not be used against a criminal defendant [***Brown v. Illinois***, 422 U. S. 590, 603 (1975)]," the **U.S. Supreme Court** ruled that: "Unless, on remand, the state can point to testimony undisclosed on the record before us, and weighty enough to carry the state's burden despite the clear force of the evidence shown here, the confession must be suppressed." The **High Court** explained that a "**seizure**

of the person within the meaning of the **Fourth** and **Fourteenth Amendments** occurs when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' ***Florida v. Bostick***, 501 U. S. 429, 437 (1991) (quoting ***Michigan v. Chesternut***, 486 U. S. 567, 569 (1988))." The Court further explained that this "test is derived from **Justice Stewart's** opinion in ***United States v. Mendenhall***, 446 U. S. 544 (1980), see ***California v. Hodari D.***, 499 U. S. 621, 627–628 (1991), which gave several '[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave,' including 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' ***Mendenhall***, *supra*, at 554." And so in ***Kaupp*** fear of the barbarians did not prevail.

KAUPP AND DRAYTON: INCONSISTANT? But wait one moment, didn't I read just last **Term** in ***Federally Speaking*** No.18 (August 2002), that what is called, in ***Kaupp***, above, a '**seizure of the person** within the meaning of the **Fourth** and **Fourteenth Amendments"** (***Robert Kaupp V. Texas,*** No. 02–5636. May 5, 2003 (538 U. S. __ (2003)), did **not** occur in ***United States V. Drayton***, 536 U. S. 194 (2002), where on a bus "there were three officers strategically placed, one of whom advised Drayton that he was looking for weapons and drugs," even though most, if not all, of the independent "'[e]xamples of circumstances that might indicate a seizure" enumerated by a presumably unanimous **U.S. Supreme Court** in ***Kaupp,*** where present in ***Drayton***. Thus, there was "'the threatening presence of several officers [there were three officers strategically placed on the bus], the display of a weapon by an officer [all officers were armed], some physical touching of the person of the citizen [they physically searched Drayton], **or** the use of language or tone of voice indicating that compliance with the officer's request might be compelled [he was told **while he was carrying drugs** that they were looking for drugs and weapons, but **not** that he could refuse to be searched]." Then too, under such circumstances, in both ***Kaupp*** and ***Drayton*** the "citizen" voiced his consent. Indeed, in ***Florida v. Bostick***, 501 U.S. 429 (1991), which the **U.S. Supreme Court** found controlling in ***Kaupp,*** unlike in either ***Drayton*** or ***Kaupp, "the officer advised the passenger that he could refuse consent to the search***"(emphasis added). Indeed, the three-Justice minority in ***Drayton,*** as explained by Justice Souter (who was in the majority in ***Bostick)***, also relying on **Justice Stewart** as the Court did in ***Kaupp***, found "an air of unreality" about the Court's explanation that to enhance "'their own safety and the safety of those around them'… bus passengers consent to searches." Applying "***Bostick's*** totality of circumstances test, and to ask whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter…. the answer is clear. The Court's contrary conclusion tells me that the majority cannot see what **Justice Stewart** saw" in ***United States v. Mendenhall***, 446 U.S. 544, 554 (1980), the effect of the "threatening presence of several officers." As the Court acknowledged in ***Kaupp***, the ***Bostick*** "test is derived from **Justice Stewart's** opinion in ***United States v. Mendenhall."*** Perchance ***Drayton*** has now been reversed and the barbarians have lost this round.

INACCURATE CRIMINAL RECORDS NOW OK? So claim the Electronic Privacy Information Center and eighty-six other civil rights advocacy groups in a letter to Mitchell E. Daniels, Jr., Director of the **Office of Management and Budget (OMB**), sent in light of the recent **U.S. Department of Justice (DOJ)** policy shift which "administratively discharged the **FBI** of its statutory duty to ensure the accuracy and completeness of the over 39 million criminal records it maintains in its **National Crime Information Center (NCIC)** database" and in the '**Central Records System** and **National Center for the Analysis of Violent Crime** systems." These organizations want the **OMB** to "exercise its oversight responsibilities under 5 U.S.C. §552 by reviewing and revising the **FBI's** recent rule" exempting the **NCIC** system "from the accuracy requirements of the **Privacy Act of 1974**" (Implementation, 68 Fed. Reg. 14140 (Mar. 24, 2003); to be codified as 28 C.F.R. pt. 16). "For the past thirty years, the **FBI** has operated the **NCIC** database with the **Privacy Act** accuracy requirement in place. The relevant provision requires that any agency that maintains a system of records, 'maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is

reasonably necessary to assure fairness to the individuals in the determination'" (5 U.S.C. §552a(e)(5)). They point out that incorrect data can ruin lives, and assert as Justice O'Connor did in her concurrence in ***Arizona v. Evans***, 514 U.S. 1, 16-17 (1995), "that it would be unreasonable, however, for a police department to depend upon a record keeping system that has no accuracy safeguards and routinely leads to false arrests," and "that if procedures were not in place to help ensure the accuracy of the data, evidence collected during those arrests could be suppressed." The **DOJ** counters by stressing the value of having non-confirmed information included because it may subsequently provide greater insights. Shades of "greater security" or shades of 1984?

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FEDERAL COURTS' INHERENT POWERS. The **U.S. Supreme Court** has confirmed and explained the **inherent powers** of **Federal Courts** in the following manner: "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.' For this reason, 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum, in their presence, and submission to their lawful mandates.' These powers are 'governed not by rule or statute but by the control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." ***Chambers v. NASCO***, 501 U.S. 32, 43 (1991) (quoting ***United States v. Hudson***, 11 U.S. 21, 23 (1812); ***Anderson v. Dunn***, 19 U.S. 93, 103 (1821); ***Link v. Wabash R.R. Co.,*** 370 U.S. 626, 630-631 (1961)). "Though they are broad in scope, 'because of their very potency, inherent powers must be exercised with restraint and discretion'." ***U.S. v. Johnson***, No. 02-1334 (7th Cir, April 24, 2003), quoting ***Chambers,*** 501 U.S. at 44.

FEDERAL JUDGE EXERCISES INHERENT POWERS. Recently, Chief Judge G. Patrick Murphy of the **U.S. District Court for the Southern District of Illinois** actually exercised these inherent powers in a matter where he perceived there was the unauthorized practice of law in his court under Illinois law. But isn't this a matter for the Illinois State authorities? That certainly was defendants' position! The **U.S. Court of Appeals for the Seventh Circuit**, however, viewed this issue of whether the **District Court** "properly invoked its inherent powers" as "a question of law reviewable ***de novo***. … Key among the inherent powers incidental to all courts," the **Seventh Circuit** reasoned, "is the authority to 'control admission to its bar and to discipline attorneys who appear before it'…(***citing Ex parte Burr***, 22 U.S. 529 (1824)), and, as we have noted previously, 'a federal court has the inherent power to sanction for conduct which abuses the judicial process.' ***Barnhill v. United States***, 11 F.3d 1360, 1367 (7th Cir. 1993). It follows logically that a federal court's power to regulate and discipline attorneys appearing before it extends to conduct by non-lawyers amounting to practicing law without a license. Moreover, considering ***the serious threat that the unauthorized practice of law poses both to the integrity of the legal profession and to the effective administration of justice***, resort to the inherent powers (which, as we stated in ***United States v. Giannattasio***, 979 F.2d 98, 101 (7th Cir. 1992), are "rooted considerations of institutional self-defense") is an appropriate remedial measure. … Here, we find no conflict between the **District Court's** imposition of sanctions pursuant to the exercise of its inherent power and the state means of enforcing the requirement that one obtain a license in order to practice law in Illinois." ***U.S. v. Johnson***, No. 02-1334 (7th Cir, April 24, 2003), emphasis added. In this case a paralegal organization was monetarily sanctioned by the **District Court** for the unauthorized practice of law for attempting to switch roles with the client's legal counsel and operate "without—and, in some cases, in contravention of—attorney oversight."

TELEMARKETERS 85 - VIETNOW 15. That's the percentages each party received from the fundraising efforts of Telemarketing Associates, Inc., et al (collectively "Telemarketers"), Illinois for-profit corporations, on behalf of VietNow National Headquarters, a charitable nonprofit corporation. The Illinois Attorney General did not like these odds. Worse yet, the Attorney General alleged that donors were

deceived as to what this actual split was. However, the Telemarketers had trumped the AG before the Illinois Supreme Court (198 Ill. 2d 345, 763 N. E. 2d 289), by playing the **U.S. Supreme Court** cards of ***Schaumburg* v. *Citizens for a Better Environment***, 444 U. S. 620 (1980); ***Secretary of State of Md.* v. *Joseph H. Munson Co.,*** 467 U. S. 947 (1984); and ***Riley* v. *National Federation of Blind of N. C., Inc.,*** 487 U. S. 781 (1988), which they successfully claimed there, brought them within the **First Amendment** prohibition on imposing prior restraints on fundraising through the imposition of regulations barring fees for charitable solicitations in excess of a prescribed level. "No, no, no," said the **U.S. Supreme Court**, not "when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener," for our "prior decisions do not rule out, as supportive of a fraud claim against fundraisers, any and all reliance on the percentage of charitable donations fundraisers retain for themselves." These earlier cases only mean that for a "fraud claim" more than "bare failure to disclose that information directly to potential donors," such as "statements designed to deceive the listener," must be plead. "Consistent with our precedent and the **First Amendment**, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used." ***Illinois Ex Rel. Madigan v. Telemarketing Associates, Inc.,*** No.01.1806, May 5, 2003 (538 U. S. __ (2003)). Ginsburg, J., delivered the opinion for a unanimous Court. **Revised Score:** VietNow 85 – Telemarketers 15.

"OPENNESS" CLASSIFIED SECRET! Under the auspices of the **Central Intelligence Agency (CIA)**, the **National Research Council Board on Life Sciences** convened a Committee to oversee a workshop to "identify issues surrounding the publication of genomic data for bio-terrorism threat agents," and then to "author a report summarizing the discussions at the workshop and providing recommendations and/or ideas about policy options." According to the "***Secrecy News***" of the Federation of American Scientists' "Project on Government Secrecy" (Volume 2003, No. 28, April 2, 2003), the consensus at the workshop was that while "the threat was real and, in fact, quite serious … '***openness*** in scientific research is the only way to go'. … On the morning of April 2, [2003,] however, the workshop participants were informed that the final summary report of the workshop ***advocating openness*** would be ***classified***" (emphasis added). ***News of the Weird***, in its May 11, 2003 column, felt that this "irony" was worthy of note.

HEAR NO EVIL, SEE NO EVIL = DO NO EVIL. So in effect said the **U.S. Circuit Court of Appeals for the Third Circuit** to **Bankruptcy Counsel** in ***In Re Bressman,*** No. 02-1725, April 25, 2003 (3rd Cir. 2003), a unanimous "precedential" opinion decided by Fuentes And Stapleton, Circuit Judges, and O'kelley, District Judge. In affirming the grant of **Summary Judgment** dismissing the **Bankruptcy Trustee's** action to **recover fees** paid to **Bankruptcy Counsel**, the Court all but said that if in accepting fees from a third party on behalf of a Bankrupt, "you hear and see no evil, you have done no evil;" or in the actual words of the Court, as "each of the law firms came forward with persuasive evidence that they knew they could not accept payment from estate assets, that they so advised their clients, that the clients committed to pay from non-estate assets, that the challenged payments came from non-estate sources, and that they were ***unaware*** of any connection between the payments and estate assets," and as "the **Trustee** came forward with no probative evidence of the firms ***being aware*** of facts that would affirmatively suggest they were receiving assets from the estate.," Judge Joseph A. Greenaway, Jr., of the **U.S. District Court for the District of New Jersey** "appropriately entered **summary judgment** in favor of the law firms" (emphasis added). Here the third party "non-estate" fee payment assets came from "Mrs. Bressman's personal account," on the business day following transfers to her of like funds from an offshore Cook Island Trust established pre-bankruptcy by the bankrupt, Mr. Bressman, and in which he retained a "contingent interest." **The moral:** Don't monkey with counsel who hear no, see no and are aware of no evil.

SCALIA'S FREE SPEECH BLACKOUT. The Cleveland City Club, according to its president James Foster, chose **U.S. Supreme Court** Justice Antonin Scalia for its "**Citadel of Free Speech Award**" because he has "consistently, across the board, had opinions or led the charge in support of **free speech**." As reported by Associated Press, however, the Justice told the Club that he wanted this blackout, that he "insisted on banning television and radio coverage." Barbara Cochran, president of the Radio-Television News Directors

Association, was quick to point out to her counterpart at the City Club that: "The irony of excluding journalists from an event designed to celebrate **the First Amendment's** guarantee of **free speech** is obvious to all. The decision to discriminate against the electronic media, especially when the City Club traditionally allows videotaping of its speakers, is reprehensible." Similarly, Vice President and Executive Producer of C-SPAN, Terry Murphy, advised that this decision "begs disbelief and seems to be in conflict with the award itself. … How free is speech if there are limits to its distribution?" In defense of this action, a request to block news coverage is not unusual or unique for **U.S. Supreme Court** Justices. The question remains was it judicious or prudent for a member of the Judiciary to do so, especially relating to this area of jurisprudence?

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You may contact columnist Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266 (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com). The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author. *Back issues are available on the United States District Court for the Western District of Pennsylvania website:* (http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm).